

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

PORT OF TACOMA, a public port district  
organized under the laws of the State of  
Washington,

Plaintiff,

v.

BURLINGTON ENVIRONMENTAL,  
LLC, a Washington limited liability  
company,

Defendant,

and

BURLINGTON ENVIRONMENTAL,  
LLC,

Counterclaimant and Third-  
Party Plaintiff,

v.

PORT OF TACOMA,

Counterclaim Defendant,

and

GENERAL METALS OF TACOMA, INC.,

Third-Party Defendant.

Case No. 3:24-cv-05093-BHS

AGREEMENT REGARDING DISCOVERY OF  
ELECTRONICALLY STORED  
INFORMATION AND ORDER

Note on Motion Calendar: December 3, 2024

AGREEMENT REGARDING DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION AND  
ORDER -- 1

Case No. 3:24-cv-05093-BHS

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1 The parties hereby stipulate to the following provisions regarding the discovery of  
2 electronically stored information (“ESI”) in this matter:

3 **A. General Principles**

4 1. An attorney’s zealous representation of a client is not compromised by  
5 conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation  
6 to cooperate in facilitating and reasonably limiting discovery requests and responses raises  
7 litigation costs and contributes to the risk of sanctions.

8 2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ.  
9 P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the  
10 application of the proportionality standard in discovery, requests for production of ESI and  
11 related responses should be reasonably targeted, clear, and as specific as possible. This  
12 agreement is intended to assist the parties in identifying relevant, responsive information that  
13 has been stored electronically and is proportional to the needs of the case. The agreement does  
14 not supplant the parties’ obligations to comply with Fed. R. Civ. P. 34.

15 **B. ESI Disclosures**

16 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each  
17 party shall disclose:

18 1. Custodians. Five (5) to seven (7) custodians most likely to have discoverable ESI  
19 in their possession, custody, or control. The custodians shall be identified by name, title,  
20 connection to the instant litigation, and the type of information under the custodian’s control. If  
21 a party, after conducting a good faith investigation, discovers that the party has fewer than five  
22 (5) custodians that are likely to have discoverable ESI in their possession, custody, or control, or  
23 that the party must disclose more than seven (7) custodians to cover all relevant topics, the  
24 parties shall meet and confer to agree on a smaller or larger number of custodians to be  
25 disclosed, as the case requires, based on the complexity, proportionality, and nature of the case.  
26 Disputes should promptly be submitted to the Court for resolution.

2. Non-Custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared drives, servers), if any, likely to contain discoverable ESI.

3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud storage) and, for each such source, the extent to which a party is (or is not) able to preserve information stored in the third-party data source.

4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B). The parties agree to take reasonable steps to preserve inaccessible discoverable data that is known to the preserving party and which is under the preserving party's custody or control until the parties meet and confer about whether such data shall be preserved.

5. Foreign Data Privacy Laws. Nothing in this Order is intended to prevent either party from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree to meet and confer before including custodians or data sources subject to such laws in any ESI or other discovery request.

### **C. ESI Discovery Procedures**

1. On-Site Inspection of Electronic Media. Such an inspection shall not be required absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

2. Search Methodology. The parties shall timely confer to attempt to reach agreement on appropriate search terms and queries, file type and date restrictions, data sources (including custodians), and other appropriate computer- or technology-aided methodologies, before any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the search methodology.

1 a. Prior to running searches:

2 i. The producing party shall disclose the data sources (including  
3 custodians), search terms and queries, any file type and date restrictions, and any other  
4 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable  
5 information. The producing party may provide unique hit counts for each search query.

6 ii. After disclosure, the parties will engage in a meet and conferral  
7 process regarding additional terms sought by the non-producing party. The parties will endeavor  
8 to identify additional search terms to be utilized by the producing party in consideration of  
9 complexity, proportionality, and nature of the case. The parties will cooperate in evaluating  
10 these considerations through the use of hit reports and refinement of searches to balance the  
11 requesting party's need for discovery of ESI with the complexity, proportionality, and nature of  
12 the case.

13 iii. The following provisions apply to search terms/queries of the  
14 requesting party. Focused terms and queries should be employed; broad terms or queries, such  
15 as product and company names, generally should be avoided. A conjunctive combination of  
16 multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count  
17 as a single search term. A disjunctive combination of multiple words or phrases (*e.g.*,  
18 "computer" or "system") broadens the search, and thus each word or phrase shall count as a  
19 separate search term unless they are variants of the same word. The producing party may  
20 identify each search term or query returning overbroad results demonstrating the overbroad  
21 results and a counter proposal correcting the overbroad search or query.

22 3. Format.

23 a. ESI will be produced to the requesting party with extracted or searchable  
24 text and agreed metadata in a form ready to load to an electronic discovery platform. The parties  
25 shall meet and confer and agree upon the format of production. Acceptable formats include, but  
26 are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),

1 single-page TIFFs (only with load files for e-discovery software that includes metadata fields  
2 identifying natural document breaks and also includes companion OCR and/or extracted text  
3 files), and PDFs (with a companion OCR or extracted text file).

4 b. Unless otherwise agreed to by the parties, files that are not easily  
5 converted to image format, such as spreadsheet, database, presentation, audio, video, and  
6 drawing files, will be produced in native format. If a document is produced in native format, a  
7 single-page Bates-stamped slip sheet stating the document has been produced in native format  
8 should also be provided. Each native file should be named for its Bates number with its original  
9 file extension and should be linked directly to its corresponding record in the load file using the  
10 NativeFileLink field.

11 c. Each document image file shall be named with a unique number (Bates  
12 Number). Parties will take reasonable steps to ensure that file names are not more than twenty  
13 characters long or contain spaces. When a text-searchable image file is produced, the producing  
14 party must preserve the integrity of the underlying ESI, *i.e.*, the original formatting, the  
15 metadata (as noted below) and, where applicable, the revision history.

16 d. If a document is more than one page, the unitization of the document and  
17 any attachments and/or affixed notes shall be maintained as they existed in the original  
18 document.

19 4. De-duplication. The parties may de-duplicate their ESI production across  
20 custodial and non-custodial data sources at the document family level, based on hash values.  
21 Attachments should not be eliminated as duplicates unless the parent email and all attachments  
22 are also duplicates. The duplicate custodian information removed during the de-duplication  
23 process will be tracked in a duplicate/other custodian field in the database load file.

24 5. Email Threading. The parties may use analytics technology to identify email  
25 threads and need only produce the unique most inclusive copy and related family members and  
26 may exclude lesser inclusive copies. The parties must maintain all parent-child relationships,

1 *i.e.*, if a lesser inclusive email has attachments not attached to the more inclusive email, the  
2 lesser inclusive email and attachments must be produced in their entirety. Upon reasonable  
3 request, the producing party will produce a less inclusive copy.

4 6. Parent-Child Document Relationships. The parties agree to produce complete  
5 document families (*i.e.*, an email and its attachments) in the same production set, with the  
6 parent-child relationship captured in the production Bates attach begin and production Bates  
7 attach end fields in the database load file. Full document families will be produced even if a  
8 single part of the family, taken out of the family context, may be non-responsive. Parties may  
9 withhold privileged documents from otherwise responsive document families by producing a  
10 single-page Bates-stamped image placeholder stating the document has been withheld for  
11 privilege.

12 7. Metadata Fields. If the requesting party seeks metadata, the parties agree that  
13 only the following metadata fields need be produced, and only to the extent it is reasonably  
14 accessible and non-privileged: document type; custodian and duplicate custodians (or storage  
15 location if no custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file  
16 name; file size; file extension; original file path; date and time created, sent, modified and/or  
17 received; and hash value. The list of metadata type is intended to be flexible and may be  
18 changed by agreement of the parties, particularly in light of advances and changes in  
19 technology, vendor, and business practices.

20 8. Hard-Copy Documents. Hard-copy documents will be scanned using Optical  
21 Character Recognition technology and searchable text files will be produced (or Unicode text  
22 format if the text is in a foreign language), unless the producing party can show that the cost  
23 would outweigh the usefulness of scanning (for example, when the condition of the paper is not  
24 conducive to scanning and will not result in accurate or reasonably useable/searchable ESI).  
25  
26

**D. Preservation of ESI**

The parties acknowledge that they have a common law obligation, as expressed in Fed. R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody, or control. With respect to preservation of ESI, the parties agree as follows:

1. Absent a showing of good cause by the requesting party, the parties shall not be required to modify the procedures used by them in the ordinary course of business to back up and archive data; provided, however, that the parties shall preserve all discoverable ESI in their possession, custody, or control.

2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P. 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure where that data is created after a disclosure or response is made (unless excluded under Sections (D)(3) or (E)(1)-(2)).

3. Absent a showing of good cause by the requesting party, the following categories of ESI need not be preserved:

- a. Deleted, slack, fragmented, or other data only accessible by forensics.
- b. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
- c. Online access data such as temporary internet files, history, cache, cookies, and the like.
- d. Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).
- e. Backup data that are duplicative of data that are more accessible elsewhere.
- f. Server, system or network logs.

g. Data remaining from systems no longer in use that is unintelligible on the systems in use.

h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that a copy of all such electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).

**E. Privilege**

1. A producing party shall create a privilege log of all documents fully withheld from production on the basis of a privilege or protection, unless otherwise agreed or excepted by this Agreement and Order.

2. The parties agree that, unless good cause exists to require a party to do so, they need not log the following:

(a) information or communications shared exclusively between a producing party and its outside counsel, or an agent of outside counsel, after the filing of the Complaint;

(b) information or communications shared with any non-testifying experts in connection with specific litigation; or

(c) information, documents, or communications protected by Federal Rule of Civil Procedure 26(b)(4).

3. Privilege logs shall include a unique identification number for each document and the basis for the claim (attorney-client privileged or work-product protection). For ESI, the privilege log may be generated using available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata provide insufficient information for the purpose of evaluating the privilege claim asserted, the producing party shall include such additional information as required by the Federal Rules of Civil Procedure. A party must manually populate on its privilege log an author



1 and date for any withheld document where that information is not provided by the objective  
2 metadata, unless such information is not reasonably discernable from the document or the  
3 information is not necessary to evaluate the claim of privilege in light of the metadata that is  
4 discernable and/or the information provided as the basis for the claim. Privilege logs will be  
5 produced to all other parties no later than 30 days before the deadline for filing motions related  
6 to discovery, unless an earlier deadline is agreed to by the parties.

7 4. Redactions need not be logged so long as the basis for the redaction is clear on  
8 the redacted document.

9 5. Activities undertaken in compliance with the duty to preserve information are  
10 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

11 6. A party may not redact information on the basis it believes such information to  
12 be irrelevant or non-responsive.

13 7. A party that withholds any document entirely on the basis of privilege shall  
14 produce a Bates-numbered placeholder page/slip sheet that contains the following language:  
15 “Document Withheld on the Basis of Privilege.” Slip sheets for withheld documents need be  
16 produced only for partially privileged families, where the producing party asserts privilege over  
17 a portion but not all of the responsive documents in the family. Slip sheets need not be produced  
18 for fully privileged document families.

19 8. Pursuant to Fed. R. Evid. 502(d), the production of any documents, electronically  
20 stored information (ESI) or information, whether inadvertent or otherwise, in this proceeding  
21 shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute  
22 a waiver by the producing party of any privilege applicable to those documents, including the  
23 attorney-client privilege, attorney work-product protection, or any other privilege or protection  
24 recognized by law. This Order shall be interpreted to provide the maximum protection allowed  
25 by Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Nothing  
26 contained herein is intended to or shall serve to limit a party’s right to conduct a review of

documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection.

DATED this 3rd day of December, 2024.

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**ORDER**

Based on the foregoing, IT IS SO ORDERED.

DATED: December 4th, 2024



The Honorable Benjamin H. Settle  
UNITED STATES DISTRICT JUDGE